IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1955.

No. 60.

LOUIS BERRA,
Petitioner,

v.

UNITED STATES OF AMERICA.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

REPLY BRIEF FOR PETITIONER.

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Argument

Petitioner's basic objection to the Government's position is the underlying assumption throughout its brief that the only statutory section invoked by the indictment is Section 145 (b) and that, therefore, this confers a pre-emptive-like status on this section against which all subsequent reasoning, argument and authority must be measured. Presumably this stems from the fact that Section 145 (b) was endorsed on the indictment and no other statutory sections

were mentioned therein. In essence, it is the Government's position that petitioner must justify his right to a lesser offense instruction under Section 3616 in the face of the clear intent of the indictment that he be tried under Section 145 (b). On the other hand, petitioner contends that, in view of the Government's concession that both crimes are charged in the indictment, there is no more warrant for assuming that only Section 145 (b) is invoked than there is for assuming that only Section 3616 is invoked. If any statute is invoked, then it is both statutes, for it is the indictment itself which informs a defendant of the charges against which he must defend and not a recitation of the statute. **Williams v. United States,** 168 U. S. 382. The recitation of a statute does not add to or weaken the legal effect of the charging allegations; the pleader's designation of a statute purporting to support the charge is immaterial, since the charge, though not sustained by that statute, may come within the terms of another. **United States v. Hutcheson,** 312 U. S. 219; **United States v. Lynch,** 7 Cir., 180 F. 2d 696. The Government seeks to weaken its concession that both offenses are charged in the indictment and seeks to overlook the lesser offense charged because of this statutory recitation. To do so, it is submitted, would be to make such recitation material and to add something to the legal effect of the indictment contrary to the established authority of this Court. **Williams v. United States,** supra; **United States v. Hutcheson,** supra. It is perhaps because of this underlying assumption that the Government in its brief has chosen to leave unanswered the contention and authorities in petitioner's brief that he is entitled to the lesser offense instruction, not because there exists a particular gradation of offenses between Section 145 (b) and Section 3616 element for element, but simply because the latter offense is as fully charged as is the former.

In its brief the Government tells us that it had a perfect right to elect to prosecute for the felony to the exclusion

of the misdemeanor for, "where Congress by more than one statute proscribes a private course of conduct, the Government may choose to invoke either applicable law," citing cases (Brief, p. 30). There is also a concession (Brief, fn. 13, p. 30) that, because each of the two offenses does not require the proof of a fact not essential to the other, the Government could not prosecute petitioner under both for filing a false income tax return. In short, the Government contends for the proposition that, where there are two statutes (one a felony and the other a misdemeanor) proscribing the same course of private conduct and requiring the same proof so that double jeopardy attaches to both, the Government in its discretion can choose to prosecute for either. Petitioner submits that neither reason nor authority supports the Government's position.

In the first place, the Government's position means that there is delegated to the United States Attorney or to the grand jury the arbitrary power to charge defendants with felonies or misdemeanors without any fixed standard for the exercise of such a power. If each of the two offenses does not require proof of even a single fact not essential to the other, then what shall we say is the standard in determining who shall be felons and who shall be misdemeanants? There would be no rational basis for the differences in range of punishment. Having rejected petitioner's diffident suggestion that the distinction between the offenses may be in the quantum of the tax evasion intent, the Government argues (Brief, p. 30) that there was no rational basis for the petit jury to have distinguished between the two offenses. If this be so, then what rational basis could there be to guide a United States Attorney or a grand jury in determining under which statute to indict? To give the Government the election here contended for would reduce the indictment of tax defendants to mere caprice—whether of the United States Attorney, the Department of Justice, or the grand jury would seem unim-

portant under our constitutional form of government. See **Rosenberg v. United States**, dissenting opinion by Mr. Justice Frankfurter, 346 U. S., l. c. 306.

In the second place, petitioner submits that the cases relied on by the Government do not support the election here urged where the proof under each statute (the felony and the misdemeanor) requires exactly the same facts. According to petitioner's understanding of these cases, the Government is given the right to choose between offenses when each requires the proof of a fact not essential to the other and double jeopardy does not attach so as to immunize the particular defendant from further prosecution for the same criminal act. It seems clear that Mr. Justice Clark's opinion in **Rosenberg v. United States**, supra, relied upon by the Government (Brief, p. 30), limits (in his next sentence following the one quoted) the election to situations where different proof is required for each offense, unlike the instant case. Such also is the import of **United States v. Beacon Brass Co.**, 344 U. S. 43 (where proof that the false statements were made in a wilful effort to evade taxes is necessary under Section 145 (b) unlike the mere making of a false statement under 18 U. S. C., Section 80), and **United States v. Noveck**, 273 U. S. 202 (where proof of the presentation of a false affidavit is necessary to constitute an attempt to evade the tax law unlike the mere making of a false affidavit for perjury). Similarly, in **United States v. Gilliland**, 312 U. S. 86, where the Government's choice of statute was approved, it is seen that different proof was required for each of the offenses involved. Under the felony statute, 18 U. S. C., Section 80, the proof required was the mere making of a false affidavit by anyone in any matter within the jurisdiction of any department or agency of the United States; on the other hand, under the Connally "Hot Oil" Act of 1935, the proof required that the false affidavit be made by the person required to file same on monthly report forms approved by the

Secretary of the Interior in violation of a regulation duly prescribed by the President. Petitioner has no quarrel with this case, for it is consistent with those giving the Government a choice as to which statute should be invoked, where different proof is required for each offense. This is not true in the instant case, the Government having already conceded that each offense does not require the proof of a fact not essential to the other (Brief, fn. 13, p. 30).

Indicative of the pre-emptive status accorded Section 145 (b) by the Government, it is charged that petitioner in effect seeks to repeal Section 145 (b) by implication. If it would help this Court any in resolving the problem before it, petitioner would similarly point the accusing finger and argue that the Government's position seeks to repeal by implication Section 3616. However, such labels, it is submitted, only obscure the basic issues. "These considerations—the fact that Congress and not the whim of the prosecutor fixes sentences, that the allegations of an indictment are to be judged by the relevant statute under which punishment may be meted out and not by the design of the prosecutor or the assumption of the trial court—cut across all the talk about repeal by implication and other empty generalities on statutory construction." **Rosenberg v. United States**, supra, l. c. 306, 307, dissent by Mr. Justice Frankfurter.

Finally, the Government urges as an alternate ground supporting the trial judge's refusal to give the misdemeanor instruction its patent inadequacy. It is said that the instruction failed to advise the jury under what state of the evidence it should consider whether petitioner had violated Section 3616 (a) and what aggravating element or elements are required for the felony but not the misdemeanor. In view of the fact that the indictment charged the crime and the evidence adduced admittedly would support a conviction under Section 3616 (a), whether or not

the presence or absence of aggravating elements is ultimately determined to be the distinction between the two, petitioner submits that a delineation of standards was not needed. It need have been given only under the Government's gradation theory of the lesser included offense which assumes that a felony under Section 145 (b) was the only offense charged; under petitioner's view that a lesser and other offense was also charged and supported by the evidence he was entitled to the instruction independently of any other offense, such as a 145 (b) violation, also charged. As a matter of fact, any failure to submit in the misdemeanor instruction elements distinguishing it from the "greater included" offense—the felony—could only have prejudiced petitioner and have been error against him about which he cannot and does not presently complain. Thus, by not educating the jury concerning the differences between the two in that part of the trial judge's charge dealing with the felony, the petitioner took the risk that he might be convicted of a felony by a jury which did not factually find the necessary aggravated elements, if such be the difference. In this manner the petitioner upon being convicted of a felony waived his right to object that the jury had been improperly instructed on the elements thereof, but it does not follow, as the Government contends, that his failure so to preserve his objection to that part of the charge defining the felony renders inadequate a requested and separate instruction that under the evidence a misdemeanor also has been committed of which the jury may find petitioner guilty.

Respectfully submitted,

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